

Message Text

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ORIGIN L-02

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DRAFTED BY L/M:JABOYD:EJS
APPROVED BY L/M:KEMALMBORG
PER/PCE/PPM/LP - W. HIBBS
PEACE CORP/GC:K.KAMMERER
EA/ANP - H. LANGE
DESIRED DISTRIBUTION
PEACE CORP - MR. KAMMERER

----- 002887

R 091854Z DEC 74
FM SECSTATE WASHDC
TO AMEMBASSY SUVA
INFO AMEMBASSY WELLINGTON

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E.O. 11652: N/A

TAGS:APER AFSP,FJ

SUBJECT: USG PARTICIPATION IN FNPF

REF: A) SUVA 1141; B) SUVA 1132

1. DEPARTMENT IS SYMPATHETIC TO BASIC THRUST OF
CRITICISMS OF GOF, PC/FIJI, AND EMBASSY, BUT HAS
DIFFICULTY IN FASHIONING SOLUTION ON BASIS OF INFORMATION
NOW AVAILABLE. DEPT SUGGESTS FURTHER EXPLORATION OF
ISSUES ON BASIS OF INFORMATION HERE PROVIDED.

2. WITH REGARD IMMUNITY QUESTION, DEPT POINTS OUT THAT
THE POSITION OF THE USG SINCE 1952 (SEE 6 WHITEMAN,
DIGEST OF INTERNATIONAL LAW 569) HAS BEEN TO NOT ASSERT
SOVEREIGN IMMUNITY AGAINST MERITORIOUS CLAIMS. THIS
POLICY IS BASED ON THE OBVIOUS EQUITABLE GROUND THAT USG
SHOULD PAY FOR THE FUNCTIONING OF THE USG IN ITS PROPRI-
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ETARY CAPACITY. PAYING EMPLOYER'S SHARE OF FIJI NATIONAL

PROVIDENT FUND WOULD NORMALLY BE CONSIDERED SUCH A PROPRIETARY, NOT SOVEREIGN, FUNCTION FOR WHICH USG WOULD BE WILLING TO PAY. IF A LAW SUIT WERE TO ARISE, THE DEPT WOULD HIGHLY LIKELY NOT CLAIM A SOVEREIGN IMMUNITY DEFENSE AND ENDEAVOR TO WAIVE DIPLOMATIC IMMUNITY OF NECESSARY OFFICIALS SO THAT CASE COULD BE DECIDED ON THE MERITS. HOWEVER, AS A MATTER OF COURSE, USG DOES NOT WHEN ENTERING INTO SUCH AGREEMENTS WISH TO WAIVE SUCH DEFENSES

PRIOR TO A SUIT ARISING. EVEN THOUGH WE HAVE CONFIDENCE IN GOF NOW AND EVERY EXPECTATION OF ENJOYING SAME IN FUTURE, WE DO NOT KNOW WHAT CLAIMS WILL BE MADE BY OPPOSING COUNSEL IN THE EVENT OF SUCH A SUIT NOR THE FOREIGN RELATIONS IMPLICATION OF LITIGATING SUCH A SUIT ON THE MERITS. THE PROPOSED AGREEMENT WITH ONE EXCEPTION NOTED BELOW THUS DOES NOT BAR ANY LEGAL ACTION CONCERNING THE PROVIDENT FUND; IT SIMPLY OF ITSELF DOES NOT SUBJECT USG OFFICIALS TO THE JURISDICTION OF THE LOCAL COURTS NOR WAIVE OTHER APPLICABLE IMMUNITIES. THE MENTIONED EXCEPTION IS PARAGRAPH 2 OF ARTICLE II WHICH BARS PENALTY INTEREST AND LIENS AND CHARGES AGAINST GOVERNMENTAL PROPERTY. SUCH AN EXCEPTION IS IN KEEPING WITH THE GENERAL PRACTICE THROUGHOUT THE WORLD WHICH PROHIBITS PENALTY FEES AGAINST GOVERNMENTS BECAUSE GOVERNMENTS LACK THE CRIMINAL INTENT REQUIRED FOR THE ASSESSMENT OF SUCH PENALTY FEES. THE REASON FOR PROHIBITING LIENS AGAINST GOVERNMENTAL PROPERTY IS THAT GOVERNMENTAL PROPERTY IS GENERALLY IMMUNE FROM LEVIES FOR THE PURPOSE OF EXECUTION. THUS, THE AGREEMENT ATTEMPTS TO STATE THE PREVAILING LAW AND CUSTOMS CONCERNING SUCH MATTERS AND BY SO DOING TO HELP RESOLVE DISPUTES BEFORE THEY ARISE.

3. ASIDE FROM THE ABOVE ARGUMENTS IN FAVOR OF AN AGREEMENT WHICH SHOULD BE SUFFICIENT OF THEMSELVES, THE USG HAS A PARTICULAR PROBLEM IN THAT THE CONGRESS HAS MADE AMPLY CLEAR ON MANY OCCASIONS THAT ALL AGREEMENTS BETWEEN THE USG AND FOREIGN SOVEREIGNS OF WHATEVER KIND SHOULD BE DULY RECORDED. THE DEPT IS THEREFORE MOST RELUCTANT TO AUTHORIZE EMBASSY TO BEGIN MAKING PAYMENTS LIMITED OFFICIAL USE

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TO GOF PURSUANT TO UNWRITTEN UNDERSTANDINGS.

4. ON ONE OTHER OCCASION DEPT HAS AUTHORIZED AN EMBASSY TO PAY INTO SUCH A FUND WITHOUT FIRST OBTAINING AN AGREEMENT; HOWEVER, IN THAT CASE, DEPT REQUESTED EMBASSY TO SUBMIT A NOTE TO WHICH HOST COUNTRY MAY OBJECT. AFTER REASONABLE PERIOD OF TIME, IF HOST COUNTRY DOES NOT OBJECT OR TAKE EXCEPTION, USG WILL

BEGIN MAKING PAYMENTS PURSUANT TO PROVISIONS OF
NOTE. IN TERMS OF INTERNATIONAL LAW, SUCH AN ARRANGE-
MENT COULD BE CONSTRUED AS AN INTERNATIONAL AGREEMENT
BINDING ON BOTH PARTIES; HOWEVER, IN DEFERENCE TO
PREFERENCES OF THE HOST GOVERNMENT THERE, USG DOES NOT
PLAN TO INCLUDE SUCH NOTE AMONG OFFICIALLY NUMBERED
TREATY SERIES. DEPT, OF COURSE, DOES NOT WISH TO EXTEND
THIS EXCEPTIONAL PROCEDURE TO THIS CASE, BUT SUCH IS

POSSIBLE.

5. WITH REGARD PARA 3 OF REFTEL B, USG HAS NOT ENTERED
INTO AGREEMENTS WITH MALAYSIA, SINGAPORE, OR NIGERIA.

6. DEPT WOULD MUCH PREFER TO ENTER INTO ONE AGREEMENT
FOR ALL USG AGENCIES INCLUDING PEACE CORPS INSTEAD OF
BARGAINING EACH INDIVIDUALLY. SEPARATE AGREEMENTS
COULD MEAN DIFFERENT DATES OF ENTRY FOR INDIVIDUAL
LOCAL EMPLOYEES AND PROBABLY WOULD RENDER MEANINGLESS
ANY ATTEMPT TO BARGAIN MEANINGFULLY AFTER FIRST AGREE-
MENT HAD BEEN MADE.

7. DEPT REQUESTS EMBASSY TO APPROACH APPROPRIATE
OFFICIALS OF GOF TO RESOLVE THIS IMPASSE. THOUGH
MR. ROBINSON IS KEY FIGURE, AN OFFICIAL WITH LEGAL
PROSPECTIVE AND BROADER VIEW THAN MR. ROBINSON MAY BE
DESIRABLE. DEPT SUGGESTS THAT RATIONALES OF PARAS 2,
3, AND 4 SHOULD BE DISCUSSED. IF POSSIBLE, OBTAIN
COUNTER OFFER INCLUDING SPECIFIC DELETIONS WHICH GOF
WISHES TO MAKE IN PROPOSED AGREEMENT. EMPHASIZE THAT
USG WISHES TO ENTER INTO ARRANGEMENT ASAP AND THAT,
THOUGH WE DO NOT WISH TO OMIT LANGUAGE DEALING WITH
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DIPLOMATIC IMMUNITIES, WE DO NOT FORESEE LIKELIHOOD
THAT SUCH WOULD EVER BE ASSERTED. NOTE THAT GIVEN
THE HISTORY OF THESE NEGOTIATIONS, REMOVING THE
LANGUAGE CONCERNING SUCH DIPLOMATIC IMMUNITIES MIGHT
WELL BE CONSTRUED BY A COURT AS A WAIVER OF THEM BY
THE USG. KISSINGER

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